73-24

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

73-24

STEVEN JEFFREY GREENWALD,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Opinion Below

The opinion of the Court of Appeals for the Sixth Circuit (Appendix, pp. 1a-4a, *infra*) is not yet reported.

Jurisdiction

The opinion and judgment of the Court of Appeals was filed on June 1, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, as a matter of law, the scope of the term: "goods, wares, or merchandise" as used in 18 U.S.C. §2314 is so broad as to include closely protected chemical formulation trade secrets which were the basis of

a company's major product development program and which themselves would not ordinarily become the subjects of barter and sale.

2. Whether the broad interpretation of the term "goods, wares, or merchandise" to include chemical formulations of a type which are not the subjects of barter and sale renders the term unconstitutionally vague, in violation of due process of law.

Constitutional Provisions and Statutes Involved

The portion of the Fifth Amendment of the Constitution relevant to this petition declares:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

The statute involved in this petition is section 2314 of Title 18 of the United States Code; which provides, in pertinent part:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;
>
> • • •
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Statement

Until June, 1970, petitioner, then twenty-six years of age, was engaged in the profession of chemical engineering (Transcript of Trial Below [hereafter designated T.] 323). For a period of time he was employed in New Jersey by

the Pearsall Corporation, a major producer of chlorinated paraffins used in the treatment of fabrics (T. 145). During the course of his employment, he legitimately came into possession of certain of Pearsall's trade secrets, including printed customer and product information sheets and chemical formulations for a flame retardant additive and a dust-collecting additive (T. 139, 329, 330).

In June, 1970, petitioner left the employ of Pearsall, and because he felt he had been treated unjustly by Pearsall, he attempted to sell the trade secrets to a competitor in Ohio (T. 338). The competitor reported petitioner's overtures to the Federal Bureau of Investigation, and at the time of the purported sale, petitioner was arrested and charged with a violation of 18 U.S.C. §2314 for transporting "goods, wares, or merchandise" (i.e. the trade secrets) interstate, knowing them to have been "stolen, converted, or taken by fraud."

During the trial, the Court refused to admit any of the product and customer information secrets (over one hundred printed sheets) on the ground that they did not constitute "goods, wares or merchandise" and dismissed the indictment as it applied to those items (T. 317-18). However, the Court refused to dismiss the indictment as it applied to the remaining three pages of chemical formulae (T. 317-18), and on June 20, 1972, petitioner was convicted. On August 21, 1972 he was sentenced to a term of three years (six months in prison and the balance on probation). On June 1, 1973, the Court of Appeals affirmed his conviction.

The principal basis of petitioner's motion to dismiss the indictment as it applied to the chemical formulae was that they could not be held to be goods, wares or merchandise within the customary definition of the term, *i.e.*, items

which are ordinarily the subjects of barter and sale, because of their uniqueness and importance to major product development at Pearsall. The sheets upon which the formulae appeared were prepared for internal use only (T. 138-39), and it was never contemplated that they would be commercially distributed in any way (T. 139). At the time of the alleged offense, it was contemplated that the two chemical formulae would form the basis of major products for Pearsall because of their uniqueness and novelty in rapidly growing markets (T. 161-63, 182-83), with annual sales forecast for each at several million dollars (T. 161-63). Therefore, petitioner contended that like the closely guarded secret formula for Coca Cola, the formulae here involved are so fundamental to the basis of the business that they would not ordinarily be sold. Indeed, as the co-developer of the secrets testified:

> "We would have wanted to keep this exclusive in this country, at least for the foreseeable future (T. 182)."

Reasons for Granting the Writ

1. This case presents an important issue involving interpretation of the term "goods, wares, or merchandise" under 18 U.S.C. §2314, which has not been settled by the Court. The Court below, professing to follow established case law in the matter, nevertheless has permitted a radical departure from the traditional definition of goods, wares, or merchandise which includes items that are ordinarily the subjects of barter and sale in commerce. See *In re Vericker*, 446 F. 2d 244 (2d Cir. 1971); *United States* v. *Seagraves*, 265 F. 2d 876 (3rd Cir. 1959); *American Cyanamid* v. *Sharff*, 309 F. 2d 790 (3rd Cir. 1962).

As applied to petitioner, the definition now applies to chemical formulation trade secrets which were created for

purposes of internally developing a major line of products for the Pearsall Corporation. As the Court below found:

> "[T]he uniqueness of Pearsall's formulations provided an appreciable competitive advantage and it chose not to reveal its discovery but to utilize it in the manufacture of its own products."
>
> Opinion of Court below, Appendix 2a.

In light of such facts, petitioner contends that the trade secrets involved here, like the secret Coca Cola formulation, are the antithesis of goods, wares, or merchandise since, to the extent that they become subjects of barter and sale in commerce, their essential function (i.e. secrecy) is defeated.

This issue should be settled by this Court in order to establish and clearly set forth limits to federal jurisdiction in this area. Misappropriations of confidential information are currently subjects of great interest to investigating bodies, the media, and the public. This Court can curtail in its inception any tendency toward government overreaction and can set forth guidelines for the benefit of all concerned by using this case as the vehicle through which the law may be clarified.

2. This Court is committed to the proposition that penal statutes be construed strictly and narrowly against the Government. As set forth by Mr. Justice Frankfurter:

> "When Congress has the will, it has no difficulty in expressing it—when it has the will that is, of defining what it desires to be the unit of prosecution . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should

> be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Bell* v. *United States,* 349 U.S. 81, 83 (1955).

Similarly see *United States* v. *Kelem,* 416 F. 2d 346 (9th Cir. 1969), *cert. denied,* 397 U.S. 952 (1970):

> ". . . the jurisdiction of federal courts is defined and limited by the Constitution and congressional action; hence statutes such as section 1341 (mail fraud) should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. . . . Moreover, such construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control effectively." 416 F. 2d at 347.

Indeed, this proposition has been applied by the Sixth Circuit in *United States* v. *Maze,* 468 F. 2d 529 (6th Cir. 1972) (a case now on review before this Court, No. 72-1168) in reversing a conviction for mail fraud based upon misuse of a credit card on the grounds that the language of the mail fraud statute could not be expansively interpreted to include credit card misuse.

The statute in this case was not construed narrowly, and as presently interpreted, its application exceeds the dimensions of federal jurisdiction clearly set forth in the statute.

In *In re Vericker,* 446 F. 2d 244 (2d Cir. 1971), the Second Circuit refused to extend the "goods, wares, or merchandise" concept of 18 U.S.C. §2314 to stolen FBI reports since they are not ordinarily sold in commerce. In doing so, it quoted the opinion of Mr. Justice Holmes in

McBoyle v. *United States*, 283 U.S. 25, 27 (1931) for the observation that:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."

As interpreted by the Court below, the common world is no longer able to understand what is included within the term "goods, wares or merchandise." Only if this Court steps in to clearly set forth a functional interpretation based upon the question whether the specific item involved is ordinarily a subject of sale in commerce can the confusion and the overbreadth of federal jurisdiction engendered by the decision below be dispelled.

3. The inclusion of the chemical trade secrets within the term "goods, wares, or merchandise" by the Court below is in conflict with a line of established authority interpreting essentially the same term as it is used in the Fair Labor Standards Act (29 U.S.C.A. §§ 201 *et seq.*). Indeed, the term used in the regulatory statute is even broader (it includes goods, ". . . wares, products, commodities, or articles or subjects of commerce of any character, or any part or ingredient thereof," 29 U.S.C.A. §203(i)) than the term used in the criminal statute.

If anything, interpretation of the term in the regulatory statute should be even more expansive in favor of the government than the interpretation permitted in the criminal statute, since it is not subject to the judicial principles favoring strict interpretation in favor of criminal defendants. (See *Bell* v. *United States, supra; United States* v.

Kelem, supra). Yet the cases decided under the regulatory act clearly make a distinction between documents which are subjects of commerce and plans and specifications for internal use.

In *Mitchell* v. *Lublin, McGaughy & Associates*, 250 F. 2d 253 (4th Cir. 1957) reversed on other grounds, 358 U.S. 207 (1959), the Court held that certain blue prints, plans and specifications prepared by consulting engineers were not goods since they were not prepared for transportation or sale as subjects of commerce. In so holding, the Court relied upon the reasoning of Judge W. Calvin Chestnut in a similar case, *McComb* v. *Turpin*, 81 F. Supp. 86 (D. Md. 1948), where it was held that engineering plans were not "goods" since they were:

> ". . . not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto. They are specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally."

Similarly, in *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2d Cir. 1948) it was held (per Judge A. N. Hand) that engineering plans were not "goods":

> "The making of these plans was not the objective undertaken by the defendants, nor did they sell them as 'goods,' but only used them for the transmission of information in the performance of their construction contract." 169 F. 2d at 733.

See also *Collins* v. *Ford, Bacon & Davis, Inc.*, 71 F. Supp. 229 (D. Pa. 1946):

> "Plans, designs and letters by which information is transmitted can be considered 'goods' only when the

plans themselves or the information contained in the letters is the thing which the employer sells and his customers buy." 71 F. Supp. at 230.

The fallacy in the reasoning of the Court below lies in its apparent inclusion of all trade secrets within the designation: "goods, wares, or merchandise." To be sure, some documents, including trade secrets, can constitute goods, wares or merchandise, as has been recognized in decisions under the Fair Labor Standards Act (See *White* v. *Wirtz*, 272 F. Supp. 70 (N.D. Okla. 1967), *aff'd* 402 F. 2d 145 (10th Cir. 1968)) (land survey plats and maps sold to mortgage company) and in decisions under 28 U.S.C. §2314 (See *United States* v. *Seagraves*, 265 F. 2d 876 (3rd Cir. 1959) (geophysical maps of a type frequently sold in commerce). But the essential distinguishing feature, as the district court in *White* v. *Wirtz*, *supra*, pointed out, is whether the documents are prepared for sale or, on the other hand, solely for uses incidental to production of other items. (See 272 F. Supp. at 71).

It is therefore patently erroneous to include within that category trade secrets which were prepared for purposes of developing a highly profitable product line which depends for its market upon the very uniqueness which is preserved and guaranteed by continued secrecy. Such trade secrets, including the chemical formulae here at issue, as well as the famed Coca Cola formulation, are by definition not of a type which are ordinary subjects of barter and sale in commerce. To permit the decision below to stand would be to countenance the incongruous result that such secrets are goods, etc. for purposes of criminal prosecution but that they are not under the broader, more expansive definition under the regulatory Fair Labor Standards Act. Alternatively, to appropriate the broad interpretation of the decision below to the use of the regulatory act would

expand the scope of that Act to include all employers who in the course of their business develop trade secrets, regardless of whether or not they produce any other "goods."

4. The term: "goods, wares, or merchandise" is obviously a property concept. It connotes something which is capable of being possessed and readily transferred. Conversion of trade secrets, on the other hand, has long been recognized to be based not upon property concepts but instead upon a theory of breach of confidential relations. In discarding the property notion, Mr. Justice Holmes observed that:

> ". . . [t]he starting point for the present matter is not property or due process of law but that the defendant stood in confidential relations with the plaintiff on the question of ethics with respect to his particular profession . . ." *E.I.DuPont Powder Co.* v. *Maryland,* 244 U.S. 100 (1917).

See also Restatement of Torts 2d 757 (1939); *W. R. Grace & Co.* v. *Hargedean,* 392 F. 2d 9 (6th Cir. 1968).

Common sense, together with the wisdom of the above authorities, reveals that there is a substantial danger of confusion when property concepts are misapplied to trade secret conversion. The problem arises from the fact that it is not the tangible document but the ideas represented upon the document that is the subject of the taking. When an employee who lawfully possesses secret information leaves an employer, he unavoidably takes some secrets with him in his head. Yet he has not deprived his employer of them, nor has he misused them. Even when, as here, secrets were represented upon sheets of paper, the departing employee does not deprive his former employer of them. When the employee attempts to transfer the secrets to another, he acts wrongfully, but he does not take property.

The difficulty in applying the property concepts of 18 U.S.C. §2314 to trade secrets has been judicially recognized in *dicta* in *United States* v. *Bottone,* 365 F. 2d 389 (2d Cir. 1966), *cert. denied* 385 U.S. 974 (1966), the affirmance of a conviction for interstate transportation of stolen drug cultures and accompanying documents, where the Court reasoned that:

> "To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that 'goods' had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed." 365 F. 2d at 393.

This is not to conclude that under no circumstances could conversion of trade secrets be the subject of a criminal prosecution. It is merely to say that a statute whose entire basis is upon *property* terminology cannot and should not be stretched to include wrongful conduct which has as its basis a violation of a confidential relationship (not a property right). To be sure, Ohio has enacted a penal statute which specifically applies to conversion of trade secrets, Ohio Revised Code §1333.51. Enactment of that statute was necessary in spite of the fact that there were conversion statutes already on the books which were couched in traditional property concepts. By a similar process, the federal government could enact legislation to punish interstate transportation of converted trade secrets. However, until it does, it should not attempt to punish wrongs to confidential relationships with a statute designed to punish wrongs to property rights.

To prevent or minimize the confusion which is here manifested, the Court should decide the issues here presented.

5. The construction which the Court below has placed upon the term: "goods, wares, or merchandise" has lowered a cloud of vagueness upon the previously clear and comprehensible statutory specification of the scope of 18 U.S.C. §2314. Now that chemical secrets which were never intended to be sold in commerce are considered to be items of a type ordinarily sold in commerce, there is virtually no way of describing, in either lay or professional terms, the dimensions of the phrase "goods, wares or merchandise."

As this Court has held many times:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . ."

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). See also *Connally* v. *General Construction Co.*, 269 U.S. 385 (1927).

Although this case differs somewhat from the standard vagueness case in that the original statutory language on

its face is relatively clear but has been rendered vague by an overbroad judicial interpretation, the undesirable effects are the same. In its vague state the statute is no longer capable of giving persons ". . . of ordinary intelligence a reasonable opportunity to know what is prohibited . . ." Moreover as broadly interpreted, the statute impermissibly permits selective and arbitrary prosecution by police officials. (See also *Scott* v. *District Attorney*, 309 F. Supp. 833 (E.D. La. 1970)). To be consistent, every act of trade secret misappropriation by dissident former employees which involves interstate movement should be a subject of prosecution. Yet clearly such prosecution does not take place. Such fact situations are much more likely to result in civil actions only, as was the case before the Sixth Circuit in *W. R. Grace & Co.* v. *Hargedean*, 392 F. 2d 9 (1968), which involved the theft of chemical trade secrets.

To prevent such judicially engrafted vagueness from becoming law and thereby violating the Fifth Amendment due process rights of petitioner and others, this Court should review this case on the merits.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court grant the *writ of certiorari* prayed for in this petition.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-2117

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN JEFFREY GREENWALD,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Decided and Filed June 1, 1973.

Before:

PHILLIPS, *Chief Judge,*
McCREE, *Circuit Judge,* and PRATT,* *District Judge.*

PRATT, *Judge.*

The defendant, Steven Jeffrey Greenwald, was convicted by a jury for a violation of Title 18, United States Code,

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*Honorable Philip Pratt, United States District Judge for the Eastern District of Michigan, sitting by designation.

Section 2314, transporting in interstate commerce "goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." The crucial issue presented by this appeal is whether secret chemical formulae, or formulations, fall within the statutory language of "goods, wares or merchandise."

The facts are essentially undisputed. Researchers of Pearsall Corporation, defendant's employer, discovered a substitute for antimony oxide, a rare and expensive chemical used in fire retardation processes. The uniqueness of Pearsall's formulations provided an appreciable competitive advantage and it chose not to reveal its discovery but to utilize it in the manufacture of its own products. The number of documents containing the formulations, therefore, was highly restricted but one set was disseminated to the defendant, a chemical engineer employed in the sales department.[1]

The uncontradicted testimony of an officer of Pearsall Corporation and the President of Dover Chemical Company, both experienced and knowledgeable in the workings of the chemical industry, demonstrated that there is an established market, even among competitors, of chemical formulae and formulations. While there is, in addition, a commerce in finished products or components, it is not uncommon, according to that testimony, for chemical manufacturers to exchange formulae and formulations either by outright sale or through licensing agreements. Significantly, these formulae are treated as assets, in the same manner as machinery, equipment or accounts receivable.

It is within this context, then, that the defendant contacted a Pearsall Chemical Corporation competitor in Ohio

[1] The set appropriated by the defendant was in the handwriting of a co-discoverer. Security considerations had prompted Pearsall Chemical Corporation to refrain from typing, printing or otherwise duplicating the original documents.

and negotiated for the transmittal of the formulation documents that had come into his possession. After several telephone calls and a personal meeting in New Jersey, it was agreed that the competitor would pay defendant $40,000 for the documents. On August 21, 1970, by prearrangement, defendant journeyed to Cleveland, Ohio, and he was there apprehended in the course of consummating the sale.

While this definitional issue is one of first impression in this Court, we have no hesitancy in following the short but impressive interpretations adopted by the Third and Second Circuits in *United States* v. *Seagraves*, 265 F.2d 876 (3rd Cir. 1959); *United States* v. *Lester*, 282 F.2d 750 (3rd Cir. 1960), *cert. denied* 364 U.S. 937 (1961); *American Cyanamid Company* v. *Sharff*, 309 F.2d 790 (3rd Cir. 1962); *United States* v. *Bottone*, 365 F.2d 389 (2d Cir. 1966), *cert. denied*, 385 U.S. 974; *In Re Carol Vericker*, 446 F.2d 244 (2d Cir. 1971).

Seagraves, supra, was concerned with the theft and sale of geophysical maps relating to locations of potential oil deposits. In considering the application of 18 U.S.C. 2314, the Court said:

> "The terms 'goods, wares, merchandise' is a general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce. Black's Law Dictionary, 4th ed. 823 (1951); 1 Bouv. Law Dict. Rawle's Third Revision p. 1365 (1914). There was evidence that maps of the type here involved are frequently sold; there was also expert testimony (other than by Gulf people) which placed the value on some of the individual maps alone at well over $5,000. Since the maps were shown without doubt to be subjects of commerce, albeit of a specialized nature, they are goods or wares or merchandise within the terms of the Act."

In a case strikingly similar to the one at bar, the Second Circuit was concerned, in part, with the theft and sale under 18 U.S.C. § 2314 of secret processes used by a drug manufacturer. Judge Friendly, speaking for the Court, stated that there was no doubt that ". . . papers describing manufacturing procedures . . ." are within the ambit of the Act.

So, here, given an established, viable, albeit limited, market in chemical formulations, and the wrongful appropriation of original documents containing such formations, the normal, ordinary and logical import of the statutory language dictates the conclusion that the documents here are "goods, wares or merchandise" within the meaning of the Act.

Other issues raised by defendant are considered to be without merit.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-24

STEPHEN JEFFREY GREENWALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the term "goods, wares, or merchandise," as used in 18 U.S.C. 2314, which makes it an offense to transport such items, if stolen, in interstate commerce, cannot properly be construed to include chemical trade secrets. He alternatively argues that such a broad interpretation renders the statutory term unconstitutionally vague.

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of having knowingly transported in interstate commerce stolen secret chemical formulae, in violation of 18 U.S.C. 2314. On August 21, 1972, he was sentenced to imprisonment for six months with probation for the balance of a three-year term. The court of appeals affirmed (Pet. App.).

The evidence is not in dispute. While employed as a chemical engineer in the sales department of Pearsall

Chemical Corporation in New Jersey, petitioner appropriated a highly restricted set of newly-discovered secret chemical formulations intended for use in fire retardation processes. While Pearsall Chemical intended to retain the secret formulations for its own use, there was uncontradicted testimony at trial that an established market for the licensing or sale of such chemical secrets existed at the time. Shortly after leaving his employment at Pearsall, petitioner contacted a Pearsall competitor in Ohio and arranged a sale of the secrets. The competitor reported petitioner's offer to the Federal Bureau of Investigation, which apprehended petitioner when he attempted to consummate the sale.

As the court of appeals held, in an opinion upon which we principally rely (Pet. App.), the term "goods, wares, or merchandise" in 18 U.S.C. 2314 is broad enough to encompass documents containing secret chemical formulations such as those involved here. The fact that petitioner's employer planned to retain the chemical secrets for use in manufacturing does not, as petitioner claims (Pet. 4), remove them from the scope of the statutory terms, for it was undisputed at trial that an outside market for the secrets did in fact exist. The formulations were of a type that is ordinarily subject to sale or license in commerce and well within the normal meaning of "goods, wares, or merchandise." See *United States* v. *Bottone*, 365 F. 2d 389, 393 (C.A. 2), certiorari denied, 385 U.S. 974; *United States* v. *Seagraves*, 265 F. 2d 876 (C.A. 3); *United States* v. *Lester*, 282 F. 2d 750 (C.A. 3), certiorari denied, 364 U.S. 937. Nor is there any merit to petitioner's claim that the statute is overly vague. As the court below stated, Section 2314 as applied here, comports with "the normal, ordinary and logical import of the statutory language * * * " (Pet. App. 4a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

DOJ-1973-08